No. 02-722

MAR 28 2003
CLERK

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION,
AMERICAN RE-INSURANCE COMPANY, ET AL.,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS
COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF REP. HENRY A. WAXMAN AND 51 OTHER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

EMILY J. STEVENS
P.O. Box 381070
Cambridge, MA 02238

KENNETH CHESEBRO
Counsel of Record
8024 Mesa Drive, #173
Austin, TX 78731
(512) 565-7244

Counsel for Amici Curiae

March 26, 2003

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether California's statutory condition on the sale of insurance within its borders, requiring disclosure of certain information pertinent to an insurer's fitness to do business, is constitutional.

2. Whether the Judiciary should invalidate the California statute using a judicially created "dormant foreign relations preemption" doctrine even though the political branches are fully empowered to preempt the statute under Art. VI, § 2, a course they have not chosen.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

ARGUMENT 2

I. HVIRA IS CONSTITUTIONAL BECAUSE IT MERELY CONDITIONS THE SALE OF INSURANCE IN CALIFORNIA ON CERTAIN DISCLOSURES RATIONALLY RELATED TO INSURERS' FITNESS, A REGULATION OF COMMERCE WELL WITHIN THE AUTHORITY CEDED BY CONGRESS 2

II. HVIRA, AS A STATUTE ENACTED IN A FIELD IN WHICH THE STATES HAVE BEEN CEDED PRIMARY AUTHORITY, MAY BE PREEMPTED ON FOREIGN RELATIONS GROUNDS ONLY BY AN ACTION OF THE POLITICAL BRANCHES HAVING THE FORCE OF LAW 7

CONCLUSION 13

APPENDIX 14

TABLE OF AUTHORITIES

CASES: **PAGE:**

Barclays Bank PLC v. Franchise Tax Board of California, 512 U.S. 298 (1994) 8-12
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) 7
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868) 2, 5
Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) 2
United States v. Darby, 312 U.S. 100 (1941) 5
Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648 (1981) 3
Zschernig v. Miller, 389 U.S. 429 (1969) 7-9, 12

CONSTITUTION AND STATUES:

U.S. Const. art. VI, § 2 ..... i, 8, 10-13
McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ... 2, 4
U.S. Holocaust Commission Act of 1998, Public Law 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note) 4, 9
Cal. Ins. Code § 13801 5
Cal. Ins. Code § 13806 3

CONGRESSIONAL HEARINGS:

Heirless Property Issues of the Holocaust: Hearing Before the House Comm. on International Relations, 105th Cong. (1998) 4
H.R. 2693, The Holocaust Victims Insurance Relief Act of 2001: Hearing Before the Subcomm. on Government Efficiency, Financial Management and Intergovernmental Relations of the House Comm. on Government Reform, 107th Cong. (2002) 4
The Restitution of Art Objects Seized by the Nazis From Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Banking and Financial Services, 105th Cong. (1998) 4

CONGRESSIONAL HEARINGS (CONTINUED): **PAGE:**

Restitution of Holocaust Assets: Hearing Before the House Comm. on Banking and Financial Services, 106th Cong. (2000) 4
The Status of Insurance Restitution for Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Government Reform, 107th Cong. (2001) 4, 9-10

BOOKS AND ARTICLES:

Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997) 8
William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387 (1983) 6-7
William Cohen, *Federalism in Equality Clothing: A Comment on* Metropolitan Life Insurance Company v. Ward, 38 Stan. L. Rev. 1 (1985) 7
Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997) . 8, 11-12
Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395 (1999) 9
Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996) 7
Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231 (2001) 11
Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C.L. Rev. 133 (1998) 11
Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L. Rev. 341 (1999) 7-8, 10-11
Peter J. Spiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223 (1999) 9

INTEREST OF *AMICI CURIAE*

Amici curiae are members of the United States House of Representatives and the United States Senate as set forth in the Appendix. *Amici* are concerned about the federalism and separation-of-powers implications of the position taken by the Executive Branch in this case.[1]

That position, if adopted by this Court, would impinge on Congress's power to regulate commerce by casting doubt on its ability to share regulatory authority with the States. Here, Congress has ceded the field of insurance regulation to the States. California has imposed a disclosure condition on future insurance operations in California that is rational and of the sort that obviously would be constitutional if imposed directly by Congress. A holding that the California statute is nonetheless unconstitutional would impair the ability of Congress to defer to the States in areas that it deems best suited for state regulation, thereby diminishing the aims of cooperative federalism.

The Executive Branch's position would also aggrandize the power of the President in a field — regulation of commerce — that under the Constitution is textually committed to Congress. The Judicial Branch should not weaken Congress's commerce powers by applying the so-called "dormant foreign relations preemption" doctrine to preempt a state statute regulating commerce in a field in which Congress has ceded primary authority to the States. It is the responsibility of the political branches of the federal government acting together (though legislation subject to the veto power or a treaty approved by the President and Senate) to override a state regulation of commerce if warranted by foreign relations concerns. There is no warrant, or need, for intervention by the Judicial Branch.

---

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity other than counsel for *amici curiae* made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. HVIRA IS CONSTITUTIONAL BECAUSE IT MERELY CONDITIONS THE SALE OF INSURANCE IN CALIFORNIA ON CERTAIN DISCLOSURES RATIONALLY RELATED TO INSURERS' FITNESS, A REGULATION OF COMMERCE WELL WITHIN THE AUTHORITY CEDED BY CONGRESS

For well over a century, the States have had primary authority over the regulation of insurance sold within their borders, initially pursuant to decisions of this Court, and then pursuant to federal legislation. *E.g.*, *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868); McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 413-18, 421-23, 429-32 (1946). The California statute at issue in this case, which merely imposes a condition on selling insurance within the state, is the type of regulation of commerce whose constitutionality has never been doubted.

The suggestion that the California statute involves an unconstitutional effort to regulate foreign relations or regulate extraterritorially depends for its plausibility on an imprecise characterization of the statute. In its *amicus* brief, the Executive Branch characterizes the statute as "requir[ing] each insurance company doing business in the State to disclose for publication detailed information concerning policies issued by the company or its affiliates in Europe decades ago." Brief for the United States as *Amicus Curiae* Supporting Petitioners ("U.S. Br.") at 5 (citing Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800 et seq.). However, HVIRA does not mandate disclosure of any information. It merely imposes as *a condition of doing business in California in the future* that an insurance company disclose certain information. (HVIRA is the only statute whose constitutionality is before the Court. Pet. App. 6a-7a, 10a-11a, 16a-17a, 38a, 43a.)

Nothing in HVIRA imposes a penalty on insurers that do not disclose the information. Nothing in HVIRA authorizes injunctive relief against insurers to compel disclosure. HVIRA merely imposes a condition on the sale of insurance in California. The sole consequence of an insurer's failure to disclose this information is that, if disclosure does not occur within 210 days of the statute's effective date, the insurance company's authority to sell insurance in California is suspended until the required disclosure occurs. Cal. Ins. Code § 13806. *See also* Brief for the Petitioners ("Pet. Br.") at 14-15 (citing administrative record indicating that insurance companies may simply cease doing business in the state if they do not wish to make the disclosures).

There is a vital distinction between a statute that compels disclosure and a statute that merely conditions continued insurance operations on disclosure. In *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), this Court confirmed that the States have broad powers to impose conditions on the ability of insurers to do business in a state. In upholding a special California tax on out-of-state insurers designed to pressure other States and foreign countries to lower taxes on California insurers, *see id.* at 649-50 & n.1, this Court stated that a State may "exclude foreign corporations from doing business within its boundaries" on terms not "imposed on domestic corporations" as long as "the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." *Id.* at 668; *see also id.* at 657-68 (surveying long line of precedent). Of course, the statute at issue in this case involves no discrimination; HVIRA's disclosure provisions apply equally to both California and non-California insurance companies that sell insurance in California.

Once HVIRA is accurately understood as merely imposing a disclosure condition on future insurance operations in California, it is easily upheld as constitutional. Solid evidence has emerged of questionable actions by insurers that sold insurance policies to

victims of the Holocaust. For decades these insurers have concealed information necessary to evaluate whether or not they took advantage of the victims of the Holocaust and their heirs. Although these insurers have a vast array of Holocaust-era policy records, they have refused to make available to the public any meaningful portion of the records. Many Holocaust victims and their heirs lack the most basic information needed to process their claims (because their own records were destroyed as a result of the Holocaust), and many insurers have wrongly denied Holocaust-era insurance claims.[2] A significant number of these insurance companies currently operate in the United States, either directly or through affiliates. Full disclosure of such information is something that rational regulators and rational consumers have a legitimate interest in securing.

In the exercise both of its own power and the additional authority ceded by Congress under the McCarran-Ferguson Act, it was obviously permissible for the California legislature to conclude as it did in HVIRA

---

[2] *Amici* and other Members of Congress are familiar with this area, as Congress has enacted pertinent legislation, *see* U.S. Holocaust Commission Act of 1998, Public Law 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note), and has held hearings. *E.g.*, *H.R. 2693, The Holocaust Victims Insurance Relief Act of 2001: Hearing Before the Subcomm. on Government Efficiency, Financial Management and Intergovernmental Relations of the House Comm. on Government Reform*, 107th Cong. (2002); *The Status of Insurance Restitution for Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Government Reform*, 107th Cong. (2001); *Restitution of Holocaust Assets: Hearing Before the House Comm. on Banking and Financial Services*, 106th Cong. (2000); *Heirless Property Issues of the Holocaust: Hearing Before the House Comm. on International Relations*, 105th Cong. (1998); *The Restitution of Art Objects Seized by the Nazis From Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Banking and Financial Services*, 105th Cong. (1998). Of the Members of Congress submitting this *amicus* brief, 31 either co-sponsored the Holocaust Commission Act of 1998, or serve on (or have served on) a committee or subcommittee that has held a hearing in this area, or both.

that an insurer, to continue selling insurance in California, must disclose its records (and those of any affiliates) with regard to Holocaust-era insurance policies. As far back as *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), this Court held that a State may require foreign insurance companies, as a condition of doing business, "to give publicity to their transactions" and "submit their affairs to proper examination." *Id.* at 182.

Although HVIRA is, on its face, a regulation of the insurance business in California of the sort that has long been recognized as constitutional, the opponents of the statute argue that one or more motives assertedly underlying the enactment invalidate it. The Executive Branch complains that HVIRA was enacted, in part, to assist Holocaust victims and their heirs in pursuing claims for payment on insurance policies, by way of arbitration or litigation. U.S. Br. at 14 (citing Cal. Ins. Code § 13801). Petitioners cite aspects of the legislative history of HVIRA suggesting that the California legislature was motivated partly by a desire to assist Holocaust victims and their heirs in uncovering information pertinent to claims they may have, not just a desire to uncover information pertinent to an insurer's fitness to do business in the future. Pet. Br. at 9-11.

Although *amici* see nothing wrong with the motives attributed to the California legislature, motives are not at issue. This Court long ago held that inquiries into legislative motive are not relevant to the constitutionality of a regulation of commerce. In *United States v. Darby*, 312 U.S. 100 (1941), the Court confronted the argument that Congress lacked the authority to prohibit interstate shipment of lumber manufactured under conditions not meeting the minimum wage and maximum hour standards of the Fair Labor Standards Act. At a time when the intrastate manufacture of goods was still viewed as "not of itself interstate commerce," the argument was made that the Act was only "nominally" a regulation of commerce, as its "motive or purpose [was] regulation of wages and hours" for manufacturing work done intrastate, "under the guise of a regulation of

interstate commerce . . . ." *Id.* at 113-14.

This Court agreed that the motive and purpose of the Act was to use Congress's regulatory power over interstate commerce to do indirectly what Congress could not do directly — alter the conditions of intrastate manufacturing work so as "to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions." *Id.* at 115. Nonetheless, this Court held that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." *Id.* It emphasized that "the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution." *Id.* at 116. Motive and purpose are likewise irrelevant in determining the constitutionality of HVIRA.[3]

Where, as here, Congress has ceded to the States plenary authority over a given area of commerce, there is no reason to impose a test for the constitutionality of a state statute regulating commerce that is any stricter than the test applied to a federal statute regulating commerce. Congress should be free to authorize States to engage in any regulation that "Congress is not constitutionally prohibited from directly adopting" through its own enactment. William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L.

---

[3] On its face, HVIRA regulates commerce within California by conditioning future business operations on the disclosure of certain information about an insurer and its affiliates. That information has a rational connection to the fitness of an insurer to do business within a state (there is no claim that requiring the information is arbitrary, in violation of substantive due process). Such disclosure permits both regulators and consumers to better analyze what future role the insurer should have in the California insurance market.

Rev. 387, 388 (1983). The issue should be: "Does Congress have the power to enact the contested legislation itself?" *Id.*; *see also id.* at 390-93, 398-401, 406, 411-12; William Cohen, *Federalism in Equality Clothing: A Comment on* Metropolitan Life Insurance Company v. Ward, 38 Stan. L. Rev. 1, 9-20 (1985). *Cf. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 901 (1985) (O'Connor, J., joined by Brennan, Marshall, and Rehnquist, J.J., dissenting) (citing 1983 Cohen article). In particular, petitioners' argument that a licensing statute like HVIRA involves prohibited extraterritorial regulation, *e.g.*, U.S. Br. at 20-28; Pet. Br. at 43-50, hardly tenable when lodged against a state statute, could not seriously be asserted against an Act of Congress. *E.g.*, *Cohen*, 35 Stan. L. Rev. at 411-12.

II. HVIRA, AS A STATUTE ENACTED IN A FIELD IN WHICH THE STATES HAVE BEEN CEDED PRIMARY AUTHORITY, MAY BE PREEMPTED ON FOREIGN RELATIONS GROUNDS ONLY BY AN ACTION OF THE POLITICAL BRANCHES HAVING THE FORCE OF LAW

Of equal concern to *amici* is the argument advanced by the Executive Branch and petitioners that even if HVIRA does not violate any specific provision of the Constitution, this Court should hold it preempted under the so-called "dormant foreign relations preemption" doctrine. This Court has relied on that doctrine to invalidate a state statute just once, more than thirty years ago, in *Zschernig v. Miller*, 389 U.S. 429 (1969). Justice Douglas's opinion for the Court in *Zschernig* set forth a radically new mode of preemption analysis that was not even necessary to the result. *See id.* at 443-57 (Harlan, J., concurring in the result). *See generally* Louis Henkin, *Foreign Affairs and the United States Constitution* 162-65 (2d ed. 1996); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L. Rev. 341,

356-57 (1999); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 864-65 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1629-31, 1643, 1649, 1660-61, 1691-93 (1997).

Under the interpretation of the highly controversial *Zschernig* doctrine advocated by the Executive Branch and petitioners, judges are to weigh various pieces of evidence about possible disruption of foreign relations to decide whether to preempt a state statute. U.S. Br. at 10-20; Pet. Br. at 19-32. Resort to such a doctrine was perhaps understandable in a context such as *Zschernig*, which involved probate courts' practice during the Cold War of voicing gratuitous, provocative criticisms of Communist nations as an excuse for disinheriting their citizens. *See Zschernig*, 389 U.S. at 433-41. But where, as here, the state action involves a state statute regulating commerce in a field that Congress has ceded to the States, the theory of dormant foreign relations preemption has no proper role. A statute such as HVIRA should be held preempted only when the political branches have taken action having the force of law and sufficient to preempt a state statute under Art. VI, § 2.

That approach is strongly supported by this Court's decision in *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298 (1994). In *Barclays Bank*, a phalanx of foreign companies and foreign governments, *see id.* at 300-01 n.†, 320, contended that California's worldwide combined report method of taxing multinational corporations should be held preempted under the foreign dormant commerce clause doctrine. They contended that California's statute undermined the "Federal Government's ability to 'speak with one voice when regulating commercial relations with foreign governments.'" *Id.* at 302-03 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979)); *see also id.* at 311, 320-30.

This Court dismissed these concerns as "directed to the wrong forum," explaining that this was not a matter to be decided under a balancing test applied by the Judicial Branch. *Id.* at 328. In particular, this Court rejected the companies' argument that the statute should be deemed preempted because of "a series of Executive Branch actions, statements, and *amicus* filings" critical of the statute. *Id.* at 328. It noted that Congress had tolerated California's method of taxing foreign corporations, *id.* at 327, and emphasized that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* at 329 (quoting Art. I, § 8, cl.3).[4]

That reasoning should be dispositive of this case. Here, Congress has not merely tolerated California's regulation of insurance; it has ceded this field of regulation to California and its sister States. Further, in legislation enacted in 1998, see note 2, *supra*, Congress favorably noted the role of state regulators in investigating the handling of Holocaust-era insurance claims. Rather than block such actions or express disapproval, Congress affirmatively instructed federal officials to review the results of the state regulators' investigations. *See* Pet. App. 47a-50a (summarizing congressional directives).

In addition, based on a hearing held in November, 2001, Congress has reason to believe that HVIRA will facilitate the expeditious implementation of the claims resolution procedures addressed in the executive agreements cited by petitioners and the Executive Branch. *See The Status of Insurance Restitution for*

---

[4] On the implications of *Barclays Bank* for the continued vitality of *Zschernig*, *see* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1426-27 (1999) (noting that "*Barclays Bank* marks a return to a" rule-like, "pre-*Zschernig* approach to state activities that cause foreign relations controversies."); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223, 1266 (1999) (noting that the reasoning of *Barclays Bank* "could be deployed to reverse" *Zschernig*).

Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Government Reform, 107th Cong. (2001). Indeed, it appears that laws such as HVIRA are necessary for Holocaust victims to take advantage of the dispute resolution procedures addressed in these executive agreements. That hearing revealed that more than 80% of Holocaust-era insurance claims submitted to the International Commission on Holocaust Era Insurance Claims (ICHEIC) cannot be adequately processed because claimants cannot identify the company holding their assets. *Id.* at 70, 180 (ICHEIC Chair Lawrence Eagleburger); *see also id.* at 90, 98 (National Association of Insurance Commissioners). HVIRA will help solve this problem, thereby facilitating the submission to ICHEIC of accurate claims, and their efficient resolution.

As suggested by *Barclays Bank*, 512 U.S. at 329, the proper method by which opponents of HVIRA may secure federal preemption of this state statute is through one of the modes listed in Article VI, § 2, of the Constitution. The foreign governments that object to HVIRA, and which are joined in their opposition by the Executive Branch, may negotiate a treaty with the President and obtain ratification from the Senate. Under Article VI, § 2, "all Treaties . . . shall be the supreme Law of the Land." Treaties were specifically listed in the Supremacy Clause, at least in part, so that the political branches could preempt state law as might be necessary to settle disputes with foreign governments. *See* Ramsey, 75 Notre Dame L. Rev. at 388-90, 404-06 & n.231. Yet the foreign governments opposing HVIRA evidently have not even attempted to negotiate a treaty preempting such state statutes. With regard to the California statute attacked in *Barclays Bank*, its opponents at least negotiated a treaty with the President under which the statute would be preempted, although the treaty was not ratified. *Barclays Bank*, 512 U.S. at 326-27.

Or, opponents of HVIRA could ask Congress to pass a statute preempting HVIRA and other similar statutes, which would equally preemptive under Art. VI, § 2. The

opponents of the California statute attacked in *Barclays Bank* pursued a lobbying effort, unsuccessfully, over a period of decades to obtain legislation preempting that and similar state tax statutes. *Id.* at 324-26. No such effort has been made with regard to HVIRA.

Instead, petitioners and the Executive Branch have brought their complaint to this Court. They rely heavily on a skeletal body of law that addresses expressly preemptive executive agreements. It is an open question whether such executive agreements can, of their own force, preempt state law. *See Barclays Bank*, 512 U.S. at 329 & n.31 (leaving undecided "whether the President may displace state law pursuant to legally binding executive agreements with foreign nations" relying solely on his own powers) (citing *United States v. Belmont*, 301 U.S. 324, 331-32 (1937)).[5] That question need not be addressed in this case, as here the President has not claimed the power to *unilaterally* preempt a state regulation of commerce such as HVIRA on the view that it interferes with foreign relations; indeed, the executive agreements here are expressly non-preemptive. U.S. Br. at 13 (acknowledging that the executive agreements "do not, of their own force, extinguish" otherwise applicable law). Petitioners and their *amici* thus request from this Court a result, based on preferences expressed by the Executive Branch, that the President was unwilling to reach when negotiating executive agreements with the foreign governments that complain of HVIRA. This Court should reject that request. To do otherwise would effectively amend Art. VI, § 2, to give expressly non-preemptive executive agreements the same dignity as treaties or statutes in their ability to preempt conflicting state law.

---

[5] *See generally* Ramsey, 75 Notre Dame L. Rev. at 404-06, 412-14, 416-17, 425-29; Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 248-49, 263-64 & n.128, 340-46 (2001); *Goldsmith*, 83 Va. L. Rev. at 1685-86; Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C.L. Rev. 133, 136-37, 152-54, 218-35 (1998).

Unable to identify any action of the political branches sufficient to preempt HVIRA under Art. VI, § 2, the opponents of HVIRA are reduced to invoking the judicially created dormant foreign relations preemption doctrine announced in *Zschernig*, under which they ask this Court to balance various pieces of evidence about possible disruption of foreign relations and preempt HVIRA based on that balancing of factors. In support, they cite various Executive Branch actions and statements (including executive agreements on Holocaust-related issues that do not purport to preempt HVIRA), protests by foreign governments, and *amicus* briefs that collectively, they urge, warrant a finding of preemption. U.S. Br. at 3-5, 13-18, Pet. Br. at 1-9, 13-14, 24-27. This Court considered similar indications of foreign relations concerns in *Barclays Bank*, holding that such arguments, because they invoked "merely precatory" expressions of federal policy that "lack[ed] the force of law," were "directed to the wrong forum" and could not support a finding of preemption. 512 U.S. at 328, 330 & n.32.

For the doctrinal reasons set forth above, we urge the same result here. Further, there are important pragmatic reasons not to regard such arguments as sufficient to establish preemption. If HVIRA actually does pose a serious threat to foreign relations, the ability of Congress and the Executive Branch to gather pertinent information is likely superior to that of the courts, and there is every reason to assume the political branches will take appropriate action. *See* Goldsmith, 83 Va. L. Rev. at 1681-90. For this Court to hold out hope of judicially fashioned preemption "can only discourage the federal political branches from exercising their constitutionally mandated foreign relations responsibilities." *Id.* at 1695. It would also "encourage[] interested groups to seek novel federal foreign relations law in the courts, where the hurdles to lawmaking are generally lower than in the political branches," which hardly comports with the constitutionally envisioned lawmaking process. *Id.* And the whole enterprise of having foreign relations preemption determined not by the political branches but

by the balancing decisions of judges undermines constitutional protections of federalism. As ratified, the Constitution contained few initial restrictions on States' involvement in foreign relations and required action by the federal political branches before more restrictions could be added. *Id.* at 1644-45.

The text and history of the Constitution, separation-of-powers principles, and principles of federalism all support the conclusion that HVIRA is not preempted under the dormant foreign relations preemption doctrine, assuming that this Court refrains at this juncture from overruling that doctrine. See note 4, *supra*.

CONCLUSION

HVIRA imposes a rational, constitutional condition on the sale of insurance within California. Congress has affirmatively ceded regulation of this field of commerce to the States. For this Court to apply the dormant foreign relations preemption doctrine to preempt HVIRA would undermine Congress's ability to exercise its commerce powers by sharing its authority with the States, thereby undermining our system of cooperative federalism. Measures such as HVIRA should only be preempted pursuant to an action of the political branches carrying the force of law and listed in Art. VI, § 2, as preemptive of state law. Petitioners' arguments should be rejected and the judgment of the court of appeals should be affirmed.

Respectfully submitted,

EMILY J. STEVENS
P.O. Box 381070
Cambridge, MA 02238

KENNETH CHESEBRO
Counsel of Record
8024 Mesa Drive, # 173
Austin, TX 78731
(512) 565-7244

Counsel for Amici Curiae

March 26, 2003

APPENDIX

Members of Congress Appearing as *Amici Curiae*:

Rep. Henry A. Waxman	California
Rep. Gary L. Ackerman	New York
Rep. Brian Baird	Washington
Rep. Shelley Berkley	Nevada
Rep. Howard L. Berman	California
Sen. Barbara Boxer	California
Rep. Benjamin L. Cardin	Maryland
Rep. Ed Case	Hawaii
Rep. John Conyers, Jr.	Michigan
Rep. Jim Cooper	Tennessee
Rep. Joseph Crowley	New York
Rep. Tom Davis	Virginia
Rep. Peter Deutsch	Florida
Rep. Mario Diaz-Balart	Florida
Rep. Norman D. Dicks	Washington
Rep. John D. Dingell	Michigan
Rep. Rahm Emanuel	Illinois
Rep. Eliot L. Engel	New York
Rep. Sam Farr	California
Sen. Dianne Feinstein	California
Rep. Mark Foley	Florida
Rep. Barney Frank	Massachusetts
Rep. Martin Frost	Texas
Rep. Jane Harman	California
Rep. Alcee L. Hastings	Florida
Rep. Maurice D. Hinchey	New York
Rep. Michael M. Honda	California
Rep. Steven C. LaTourette	Ohio
Rep. Barbara Lee	California
Rep. Sander M. Levin	Michigan
Rep. Nita M. Lowey	New York
Rep. Carolyn McCarthy	New York
Rep. Jim McDermott	Washington
Rep. Michael R. McNulty	New York
Rep. Carolyn B. Maloney	New York
Rep. Kendrick B. Meek	Florida

Rep. Jerrold Nadler	New York
Sen. Bill Nelson	Florida
Rep. Eleanor Holmes Norton	Washington, D.C.
Rep. John W. Olver	Massachusetts
Rep. Major R. Owens	New York
Rep. Frank Pallone, Jr.	New Jersey
Rep. Nancy Pelosi	California
Rep. Dana Rohrabacher	California
Rep. Ileana Ros-Lehtinen	Florida
Rep. Janice D. Schakowsky	Illinois
Rep. Adam B. Schiff	California
Rep. Christopher Shays	Connecticut
Rep. Brad Sherman	California
Rep. Diane E. Watson	California
Rep. Anthony Weiner	New York
Rep. Robert Wexler	Florida